

**TENNESSEE DEPARTMENT OF REVENUE  
REVENUE RULING #94-01**

**WARNING**

**Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.**

**SUBJECT**

Application of Tennessee corporate franchise, excise taxes to a manufacturer, bottler, and seller of soft drinks whose only contact with Tennessee is by fax, telephone or mail, or through the activities of its sales people or sales managers who work out of their homes in Tennessee or who travel into Tennessee from other states.

**SCOPE**

Revenue rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue rulings are advisory in nature and are not binding on the Department.

**FACTS**

The Company manufactures and bottles soft drinks and sells them to distributors in a number of states. The Company neither maintains an office nor owns any property in Tennessee. It does not pay or otherwise compensate or reimburse its sales people or sales managers for the use of any part of their homes as offices. The Company's sales efforts are made primarily to distributor customers from outside the State and are conducted by fax, telephone and mail. Sales orders are approved at the Company's main office located outside of Tennessee. Upon acceptance of the order at the company headquarters located outside Tennessee, the product is shipped, usually through public carrier and occasionally by the customer distributor's own trucks, from outside Tennessee to the Tennessee customer distributor. The distributors, in turn, solicit orders in the State from retail outlets and sell to them from their stock of merchandise. In addition, sales to the distributor's customers are facilitated by Company sales people, working out of their homes, whose primary responsibilities are the solicitation of orders and the supervision of promotional efforts, which involves making sure the distributor is promoting the product according to certain requirements.

The Company employs area sales managers ("Managers") in Tennessee on a full-time basis. Supervised by regional sales managers located outside of Tennessee, the Managers' responsibilities involve working with distributors. This entails supporting the distributors sales efforts to accomplish retail distribution and conducting promotional activities such as discount programs, to achieve sales volumes in a cost effective manner.

The Managers' responsibilities include the following activities:

Acting as a primary channel of communication between the Company and its distributors for the purpose of achieving and maintaining the distribution of Company products in various retail outlets.

Making visits to retail sites to monitor promotional activities and other retail activities to keep abreast of competitive activities and to perform field surveys. The manager may verify that a photo display is prominently displayed near the product and make sure the product is featured in a prominent location.

Developing selling programs with distributors achieve their sales objectives. This involves adopting a national sales program to the local area and development of a game plan to enter various markets.

Accompanying distributors' sales personnel to make calls on key accounts for the purpose of achieving new distribution, gaining cooperation on promotional efforts and to expand selling efforts.

Working with distributors' sales personnel developing selling skills, providing education with regard to the product and motivating their sales personnel. This is done "on the job" and does not involve training classes.

Filing reports which reflect promotional results, and making suggestions for improvements.

Regional Sales Managers have greater responsibility and experience than Area Sales managers. They supervise area sales managers and are responsible for several states. Regional sales managers do not usually make calls on retail establishments, but may call on a retailer's headquarters to make a sales pitch, or to explain or encourage specific promotions.

Managers have in their possession only promotional materials and product samples. They do not carry with them a stock of the soft drink to replace damaged products discovered upon their visits to distributors or to otherwise distribute directly to customers. No

charge is made by the Company to distributors or the retailers for any of the training, personnel development, product education or other services performed by sales personnel or Managers. Managers activities are intended to increase distributors' sales and, in turn, increase the Company's sales.

## **ISSUE**

Does the Company's business activities in Tennessee constitute doing business in Tennessee so as to subject it to Tennessee corporate franchise, excise tax?

## **RULING**

No.

## **ANALYSIS**

### *APPLICABLE STATUTORY LAW AND CASE LAW*

T.C.A. § 67-4-806(a) and 67-4-903(a) impose Tennessee corporate franchise, excise taxes on "All Corporations, . . . organized for profit under the laws of this state or any other state or country and doing business in Tennessee . . ." Tennessee law does not define the term "doing business in Tennessee", however Title 15 United States Code Annotated Section 381(a) prohibits imposition of a net income tax when the taxpayer's only business in the taxing state is the solicitation of sales of tangible goods in interstate commerce. Title 15 U.S.C.A. Section 381(a) reads as follows:

(a) "No State . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer of such person to enable such customer to

fill orders resulting from such solicitation are orders described in paragraph (1).”

*Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, 112 S.Ct. 2447 (1992) concerns the scope of Title 15 U.S.C.A. Section 381 and the activities it protects. In *Wrigley*, the United States Supreme Court held that "solicitation of orders" is protected and includes not only any speech or conduct that explicitly or implicitly invites or proposes an order, but also covers those activities that are entirely ancillary to requests for purchases and serve no independent business function apart from their connection to soliciting of orders. *Id.* at 2453, 2454 and 2456.

Although the entire process associated with the invitation of an order is protected, the phrase "solicitation of orders" does not embrace all activities that are routinely or even closely associated with solicitation or customarily performed by salesmen. *Id.* At 2455 and 2456. Activities that a company would have reason to engage in anyway, apart from solicitation of orders, but chooses to allocate to its in-state sales force are not protected. *Id.* at 2456.

For example, providing a car and a stock of free samples to salesmen is part of the "solicitation of orders" because the only reason to do it is to facilitate requests for purchases. However, employing salesmen to repair or service the company's products is not part of the "solicitation of orders" since there is a good reason to get that done whether or not the company has a sales force. Repair and servicing may help to increase purchases; but they are not ancillary to requesting purchases and cannot be converted into "solicitation" by merely being assigned to salesmen. Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the state by the company or on its behalf, would go beyond the "solicitation of orders". Activities that take place after a sale will ordinarily not be entirely ancillary to requests for purchases, but there may be exceptions. *Id.* at 2457.

#### *APPLICATION OF STATUTORY LAW AND CASE LAW TO FACTS PRESENTED*

In order to determine whether the Company is "doing business in Tennessee" so as to be subject to corporate franchise, excise taxes, we must carefully examine each of its activities in Tennessee in the light of the immunity provisions set forth in Title 15, U.S.C.A. Section 381 and the criteria set forth by the United States Supreme Court in *Wrigley*.

Title 15, U.S.C.A. Section 381(a)(1) prohibits imposition of a state income tax when the only activity in the state is solicitation of orders for sales of tangible personal property when such orders are sent outside the state for approval or rejection and approved orders are shipped and delivered from a point outside the state. Here the orders are primarily not even solicited by sales people in Tennessee, but are solicited from outside Tennessee by means of fax, telephone and mail and occasionally shipment is made by the customer's

own trucks rather than by public carrier. This activity does not, of itself, subject the Company to Tennessee corporate franchise excise taxes.

The Company facilitates sales to the customers of its customer distributors by the use of Company sales people working out of their Tennessee homes, whose primary responsibilities are the solicitation of orders and supervision of promotional efforts. The Company also employs full time sales managers (Managers) who do work in Tennessee and are supervised by regional sales managers located outside Tennessee. The Managers work with customer distributors to support such distributors' sales efforts to accomplish retail distribution. Managers also conduct promotional activities to cost effectively achieve sales volumes. On occasion Managers visit retail customers of distributors to monitor certain activities, achieve new distribution, expand selling efforts and to carry out other responsibilities already outlined. The Company does not pay or otherwise compensate or reimburse its sales people or sales managers for use of any part of their homes as offices.

Title 15, U.S.C.A. 381(a)(2) shields a manufacturer's "missionary" request that an indirect customer (such as a consumer) place an order, if a successful request would ultimately result in an order being filled by a Section 381 "customer" of the manufacturer, i.e. by the wholesaler who fills the orders of the retailer with goods shipped to the wholesaler from out of state. *Wrigley*, *supra* at 2459. The question to be determined in the case of the Company's sales people and Managers is whether their activities in Tennessee fall within the scope of federal law immunity because they are entirely ancillary to the requests for purchases and serve no independent purpose or business function apart from their connection to the soliciting of orders.

*Brown-Forman Distillers Corporation v. Collector of Revenue*, 101 So.2d 70 (La. 1958) appeal dismissed 79 S.Ct. 602, was one of the primary cases that prompted the passage of Title 15, U.S.C.A. Section 381. Louisiana activities in *Brown-Forman* were limited to "the presence of 'missionary men' who call upon wholesale dealers and who, on occasion, accompany the salesman of these wholesalers to assist them in obtaining suitable display of appellant's merchandise at the business establishments of said retailers . . ." *Id.* At 70. The Louisiana Supreme Court upheld taxation and the United States Supreme Court granted a motion to dismiss the appeal. In *Wrigley*, *supra* at 2455, the United States Supreme Court indicates that the passage of section 381 has broadened the interpretation of "solicitation" to the extent that *Brown-Forman* would not be decided as before, upholding taxation. Advice by a manufacturer to the customer of a wholesaler on the art of displaying goods to the public can hardly be more thoroughly solicitation. *Wrigley*, *supra* at 2459 quoting *Gillette Co. V. State Tax Commissioner*, 393 N.Y. S.2d 186 (N.Y. 1977).

*Wrigley* held that such activities by sales persons or sales managers as in-state recruitment, training and evaluation of performance of its sales representatives, use of hotels and homes for sales-related meetings, general advertising in Wisconsin, providing free samples, recommendations as to hiring, firing and compensation of sales

representatives, intervention in credit disputes, and writing and reviewing reports served no purpose apart from facilitating solicitation and must be viewed as ancillary to requesting purchases. *Supra* at 2449 and 2459.

It follows in this factual situation that conducting and supervising promotional activities with distributors and developing selling programs with them, working with distributors, sales people to develop selling skills and provide product education, and filing reports on promotional results with suggestions for improvements, all without cost to the distributor, could have no purpose or independent business function separate from facilitation of solicitation and are therefore ancillary to "solicitation" as the term is used in section 381. The same can be said of uncompensated monitoring of promotional and retail activities at retail sites, and visiting retail sites to perform field surveys and keep abreast of competitive activities.

The Company would not have reason to conduct any of the Tennessee activities named if they did not result in requests for purchases. Such activities make it more likely that a retailer will place an order with the distributor and in turn the distributor will then be obliged to place an order with the Company. This is the only benefit the company will receive from performing the described activities in Tennessee.

### **CONCLUSION**

All the Company's activities in Tennessee consists of "solicitation" of orders for interstate sales as is permitted by Title 15, U.S.C.A. Section 381, or are activities that are entirely ancillary to requests for purchases and serve no independent business function apart from their connection to the soliciting of orders. Therefore, the Company is not subject to Tennessee Corporate franchise, excise taxes.

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APPROVED: Joe Huddleston, Commissioner of Revenue

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